

**THE STATE OF NEW HAMPSHIRE**  
**Southern District of Hillsborough County**

30 Spring Street  
P. O. Box 2072  
Nashua, NH 03061 2072  
603 883-6461

**NOTICE OF DECISION**

RECEIVED  
DEC 02 2004

Office of Corporation Counsel  
City of Nashua, NH

DAVID R CONNELL ESQ  
229 MAIN STREET  
PO BOX 2019  
NASHUA NH 03061

*DRC SS*

04-C-0169 Pennichuck Corporation, et al v. City of Nashua

Please be advised that on 11/30/2004 Judge Lynn made the following order relative to:

**Motion to Dismiss ; Granted**  
as to Counts 2,4,5,6. see attached order

12/01/2004

Marshall A. Buttrick  
Clerk of Court

cc: Thomas J Donovan Esq  
Robert Upton II Esq

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS  
SOUTHERN DISTRICT

SUPERIOR COURT

NO. 04-C-169

PENNICHUCK CORPORATION, PENNICHUCK WATER WORKS, INC.,  
PENNICHUCK EAST UTILITY, INC., AND PITTSFIELD AQUEDUCT  
COMPANY, INC.

V.

CITY OF NASHUA

ORDER

This lawsuit by plaintiffs Pennichuck Corporation and its wholly owned subsidiaries (Pennichuck) against the defendant City of Nashua (City) arises out of the City's efforts to take Pennichuck's property by eminent domain pursuant to RSA chapter 38 (1997). Although the remedy sought here is damages rather than declaratory and injunctive relief, this case is a companion to Docket No. 04-E-062. On August 31, 2004, the court granted the City's motion for summary judgment with respect to all claims asserted by Pennichuck in the latter action save for the claim of as-applied inverse condemnation. The court also reserved ruling on the issue of whether Pennichuck would be entitled to a jury trial if it was dissatisfied with any damages that might be assessed by the Public Utilities Commission (PUC) should that agency determine that the acquisition by the City of some or all of Pennichuck's property was in the public interest.

The background of the dispute between Pennichuck and the City is described in detail in the August 31 order in No. 04-E-062 and need not be

repeated here. It is sufficient for present purposes to note that the complaint in this case asserts the following claims: (1) deprivation of Pennichuck's federal right to substantive due process in violation of the fourteenth amendment to the United States Constitution and 42 U.S.C. § 1983 (Count I); (2) deprivation of Pennichuck's right to due process and to engage in commerce as guaranteed by part II, articles 14 and 83 of the New Hampshire Constitution (Count II); (3) taking of Pennichuck's property by inverse condemnation without payment of just compensation in violation of the fifth and fourteenth amendments and 42 U.S.C § 1983 (Count III); (4) inverse condemnation in violation of the state constitution (Count IV); (5) intentional interference with contractual relations (Count V); and (6) unfair business practices in violation of the New Hampshire Consumer Protection Act, RSA chapter 358-A (Count VI).

On June 2, 2004, the City removed this case to the United States District Court for the District of New Hampshire. By order dated September 13, 2004, the district court (DiClerico, J.) dismissed Pennichuck's federal claims (e.g., Counts I and III) without prejudice because of the company's failure to pursue available state remedies and declined to exercise supplemental jurisdiction over Pennichuck's state claims. The entire case was then remanded to this court.

As discussed in this court's August 31 order, the RSA 38 statutory scheme is not facially unconstitutional, and the City therefore may not be held liable in damages simply because it has chosen to condemn Pennichuck's property pursuant to that statute. The upshot of all of Pennichuck's claims, however, is that the City has not invoked the RSA 38 procedures in good faith and for the

legitimate purpose of actually acquiring some or all of Pennichuck's property. Rather, Pennichuck avers that the City has never had any real intention of acquiring Pennichuck's property but instead has used the specter of eminent domain proceedings to upset Pennichuck's attempt to merge with Philadelphia Suburban Corporation (PSC). Because the case is before the court at this juncture on a motion to dismiss, the court must accept these allegations as true. The question then becomes whether, assuming the City has acted in bad faith and/or with an improper motive, Pennichuck would be entitled to recover damages under any of the theories alleged in Counts II, IV, V or VI of its complaint. The court finds it unnecessary to answer this question, however, because even assuming that one or more of Pennichuck's claims might at some point prove to be meritorious, it is apparent that none of the claims are ripe for adjudication in this forum at this time.

Despite Pennichuck's claim that the City has no intention of actually acquiring its property, the fact is that the City has commenced condemnation proceedings before the PUC. Those proceedings are ongoing at the present time and the outcome of those proceedings will undoubtedly have a significant – indeed very likely a dispositive – affect on the claims made by Pennichuck herein. For example, if the PUC determines that it is in the public interest for the City to acquire the Pennichuck property which the City seeks, and if the City thereafter does acquire said property at the price established through that proceeding (including any appropriate appeals), the claims made by Pennichuck in this proceeding would be completely undercut from a factual standpoint if not

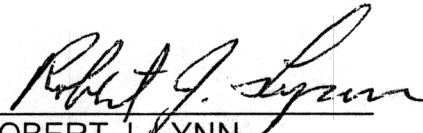
rendered moot as a matter of law. On the other hand, if -- as Pennichuck apparently fears will be the case -- the City forces the company through a lengthy and expensive proceeding before the PUC only to abandon its acquisition efforts at or near the end of that process, Pennichuck may sustain future damages that dwarf those which it claims have incurred to date but that are not ascertainable at this time. In short, this is a case where the proof of Pennichuck's claims will stand or fall in the pudding of proceedings yet to occur before the PUC

Furthermore, the issues of the City's alleged bad faith, improper motive, and lack of intent to follow through with the acquisition obviously are matters that would have a significant bearing on the question of whether the proposed condemnation is in fact in the public interest. As such, these issues can be raised by Pennichuck before the PUC. Similarly, insofar as Pennichuck claims that the "before-taking" value of its property was improperly diminished by the bad faith conduct of the City prior to the initiation of the condemnation proceedings, there appears to be no reason why Pennichuck could not present such evidence in the PUC proceedings for such bearing as it may have on the issue of what constitutes just compensation for any takings that the PUC allows.

Finally, to permit this case to move forward at the same time that proceedings are ongoing before the PUC runs the risk of potentially conflicting rulings, duplicative discovery and a needless increase in the complexity of the overall litigation.

For the reasons stated above, the City's motion to dismiss Counts II, IV, V and VI is granted without prejudice to Pennichuck's right to renew said claims, if appropriate, once the proceedings before the PUC have been finally resolved.

November 30, 2004

  
ROBERT J. LYNN  
Chief Justice